United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2195. 756

WISDOM D. BROWN, APPELLANT,

vs.

PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 22, 1910.

December 7-1910

Robt. H. J.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2195.

WISDOM D. BROWN, APPELLANT,

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 13, 1910.

In the Court of Appeals of the District of Columbia.

No. 2195.

WISDOM D. BROWN, Appellant,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
a Corporation.

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a Supreme Court of the District of Columbia.

At Law. No. 50792.

WISDOM D. BROWN, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Declaration.*

Filed Jul- 22, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50792.

WISDOM D. BROWN, Plaintiff,
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY,
a Corporation, Defendant.

1. Th*a* plaintiff, Wisdom D. Brown, sues the defendant, the Philadelphia, Baltimore and Washington Railroad Company, a body corporate, having an office and an agent and doing business in the District of Columbia, for that, heretofore, to-wit, on the 17th day

of January, 1907, at the City of Washington, in the District of Columbia, the plaintiff was lawfully possessed as of his own property, of certain goods and chattels, to-wit, one thousand seven hundred and ninety-four (1794) automatic mail boxes contained in three hundred and three (303) crates, the said goods and chattels being of the value of Two Thousand Five Hundred Dollars ($2,500). And being so possessed thereof, he, the plaintiff, afterwards, to-wit, on the dat- and year first aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to-wit, on the day and year first aforesaid, in the City of Washington, in the District of Columbia, came to the possession of the defendant by finding; yet the defendant, well knowing the said goods and
2 chattels to be the property of the plaintiff and of right to belong and appertain to him, but contriving and fraudulently intending to deceive and defraud the plaintiff in that behalf, has not as yet delivered the said goods and chattels or any or either or any part thereof to the plaintiff, although often requested so to do; but has hitherto wholly refused so to do; and afterwards, to-wit, on the day and year first aforesaid, at the City of Washington, in the District of Columbia, the defendant converted and disposed of the said goods and chattels to its own use, to the damage of the plaintiff in the sum of Two Thousand Five Hundred Dollars ($2,500). Wherefore the plaintiff brings this suit and claims the sum of Two Thousand Five Hundred Dollars ($2,500.), besides costs of suit.

2. The plaintiff, Wisdom D. Brown, further sues the defendant, the Philadelphia, Baltimore and Washington Railroad Company, a body corporate, having an office and an agent and doing business in the District of Columbia and being a common carrier in the said District, for that heretofore, to-wit, on the 17th day of January 1907, at the City of Washington, in the District of Columbia, the plaintiff was entitled to the possession of certain goods and chattels, to-wit, one thousand seven hundred and ninety-four (1,794) automatic mail boxes, contained in three hundred and three (303) crates, the said goods and chattels being of the value of Two Thousand Five Hundred Dollars ($2,500) lawful money of the United States, which said goods and chattels had been, before the date aforesaid, shipped and consigned to the plaintiff at the City
3 of Washington, in the District of Columbia, by the Burnham Manufacturing Company, from the village of Wapakoneta, Ohio, and had been received and transported by the defendant over its lines of railroad to the City of Washington, District of Columbia for the purpose of delivering the same to the plaintiff, upon the payment by the plaintiff to the defendant of its proper freight charges for the transportation thereof, and which said goods and chattels on the day and year first aforesaid, to-wit, on the 17th day of January, 1907, had arrived in the said City of Washington, District of Columbia and were in the custody and possession of the defendant, as a common carrier, in said City and District; and the plaintiff says that it became and was the duty of the defendant, upon the arrival of the said goods and chattels at the City of Wash-

ington, in the District of Columbia, to deliver the same to the plaintiff upon the payment or tender by the plaintiff to the defendant of its proper freight charges for the transportation thereof; and the plaintiff says that on to wit, the 17th day of January, 1907, he offered and tendered to the defendant the amount of freight charges lawfully due to the defendant for the transportation of said goods and chattels as aforesaid, and requested the defendant to deliver said goods and chattels to him; and it then and there became and was the duty of the defendant to deliver said goods and chattels to the plaintiff, but unmindful of its duty in the premises, the defendant on the day and year last aforesaid, to-wit, on the 17th day of January, 1907, failed and refused, and still fails and refuses to deliver said goods and chattels or any or either of them or any part thereof to the plaintiff, whereby said
4 goods and chattels and the value thereof became wholly lost to the plaintiff, and the plaintiff was damaged in the sum of Two Thousand Five Hundred Dollars ($2,500). Wherefore the plaintiff brings this suit, and claims the sum of Two Thousand Five Hundred Dollars ($2,500) besides costs of suit.

3. The plaintiff, Wisdom D. Brown, further sues the defendant, the Philadelphia, Baltimore and Washington Railroad Company, a body corporate, having an office and an agent and doing business in the District of Columbia, and being a common carrier in the said District, for that heretofore, to-wit, on the 17th day of January, 1907, at the City of Washington, in the District of Columbia, the plaintiff was the owner of certain goods and chattels, to-wit, one thousand seven hundred and ninety-four (1,794) automatic mail boxes, contained in three hundred and three (303) crates, the said goods and chattels being of the value of Two Thousand Five Hundred Dollars ($2,500) lawful money of the United States, which said goods and chattels had been, before the date aforesaid, shipped to the plaintiff at the City of Washington, in the District of Columbia, by the Burnham Manufacturing Company, from the village of Wapakoneta, Ohio, and had been received and transported by the defendant over its lines of railroad to the City of Washington, in the District of Columbia, for the purpose of delivering the same to the plaintiff, upon the payment by the plaintiff to the defendant of its proper freight charges for the transportation thereof, and which said goods and chattels on the day and year first
5 aforesaid, to-wit, on the 17th day of January, 1907, had arrived in the said city of Washington, District of Columbia, and were in the custody and possession of the defendant, as a common carrier, in said City and District; and the plaintiff says that it became and was the duty of the defendant, upon the arrival of the said goods and chattels at the City of Washington, in the District of Columbia, to deliver the same to the plaintiff upon the payment or tender by the plaintiff to the defendant of its proper freight charges for the transportation thereof; and the plaintiff says that on to-wit, the 17th day of January, 1907, he offered and tendered to the defendant the amount of freight charges lawfully due to the defendant for the transportation of said goods and chattels, as

aforesaid, and requested the defendant to deliver said goods and chattels to him; and it then and there became and was the duty of the defendant to deliver said goods and chattels to the plaintiff, but unmindful of its duty in the premises, the defendant on the day and year last aforesaid, to-wit, on the 17th day of January, 1907, failed and refused, and still fails and refuses to deliver said goods and chattels or any or either of them or any part thereof to the plaintiff, whereby said goods and chattels and the value thereof became wholly lost to the plaintiff, and the plaintiff was damaged in the sum of Two Thousand Five Hundred Dollars ($2,500). Wherefore the plaintiff brings this suit, and claims the sum of Two Thousand Five Hundred Dollars ($2,500) besides costs of suit.

CHAS. COLDEN MILLER,
G. L. BAKER,
E. B. SHERRILL,
Attorneys for Plaintiff.

6 *Notice to Plead.*

The defendant is to plead hereto on or before the twentieth day exclusive of Sundays and legal Holidays occurring after the date of service hereof; otherwise judgment.

CHAS. COLDEN MILLER,
G. L. BAKER,
E. B. SHERRILL,
Attorneys for Plaintiff.

Pleas.

Filed Aug. 5, 1908.

* * * * * * *

1. Now comes the defendant and for pleas to the declaration of the plaintiff filed in the above entitled cause says that it is not guilty as alleged.

2. And for a second and further plea to the first count of said declaration the defendant says the plaintiff was not lawfully possessed of the goods and chattels described in said count of the said declaration as alleged.

3. And for a third and further plea to the second count of said declaration the defendant says that the plaintiff was not entitled to the possession of the goods and chattels described in said count of the said declaration as alleged.

7 4. And for a fourth and further plea to the third count of said declaration the defendant says that the plaintiff was not the owner of the goods and chattels described in said count of the said declaration as alleged.

McKENNEY & FLANNERY,
Attorneys for the Defendant.

Joinder of Issue.

Filed Sep. 9, 1908.

* * * * * * *

The plaintiff joins issue with the defendant on its pleas, and each of them, filed herein.

G. L. BAKER,
E. B. SHERRILL,
C. COLDEN MILLER,
Attorneys for Plaintiff.

Memorandum.

April 5, 1910.—Verdict for defendant.

8 Supreme Court of the District of Columbia.

THURSDAY, *April 14th,* 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

It appearing that under the Rule of Court, judgment on verdict should be entered herein, it is so ordered. Wherefore, it is considered, that the plaintiff take nothing by this action, that the defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the Clerk and have execution thereof.

Order to Enter an Appeal.

Filed Apr. 14, 1910.

* * * * * * *

The Clerk of said Court will enter an appeal to the Court of Appeals in the above cause.

HUGH H. OBEAR,
Attorneys for Plaintiff.

9 In the Supreme Court of the District of Columbia.

At Law. No. 50792.

WISDOM D. BROWN
vs.
PHILADELPHIA, BALTIMORE AND WASHINGTON RAILROAD COMPANY, a Corporation.

The President of the United States to Philadelphia, Baltimore and Washington Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing

the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal entered in the Supreme Court of the District of Columbia, on the 14th day of April, 19—, wherein Wisdom D. Brown is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 14th day of April in the year of our Lord one thousand nine hundred and ten.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN, *Ass't Clerk.*

Service of the above Citation accepted this 14th day of April, 1910.

McKENNEY & FLANNERY,
Attorneys for Appellee.

[Endorsed:] No. 50792 Law. Brown vs. P. B. & W. R. R. Co. Citation. Issued April 14", 1910. Served Cop- of the within Citation on —— ——. —— ——, Marshal. C. C. Miller, H. H. Obear, Attorney- for Appellant.

May 6, 1910.—Appeal bond approved and filed.

May 25, 1910.—Time to submit bill of exceptions and file transcript of record extended to June 27, 1910.

June 24, 1910.—Time to submit Bill of Exceptions and to file transcript of record extended to July 13, 1910, inclusive.

Supreme Court of the District of Columbia.

WEDNESDAY, *July* 13*th,* 1910.

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, Justice, presiding.

* * * * * * *

Comes now the plaintiff by his attorneys of record and submitting to the Court the Bill of Exceptions taken at the trial of this cause prays that the same be signed and made of record nunc pro tunc, which is hereby accordingly done and so ordered.

Further upon motion of the plaintiff and for cause shown, it is this 13th day of July, 1910, ordered that the time for filing the transcript of record on appeal in the above-entitled cause be, and it is hereby extended to and including the 1st day of August, 1910.

11 *Bill of Exceptions.*

Filed Jul- 13, 1910.

* * * * * * *

To Messrs. McKenney & Flannery, Attorneys for Defendant:

We herewith tender to you the bill of exceptions in the above entitled cause, and give notice that we shall present the same to Mr. Chief Justice Clabaugh, holding Circuit Court No. 2, on the 9th day of July, 1910, at ten o'clock a. m., or as soon thereafter as counsel can be heard, and shall then and there move the court to sign and seal the same, and to make the same part of the record herein.

G. L. BAKER,
C. C. MILLER,
H. H. OBEAR,
Attorneys for Plaintiff.

Service of the foregoing notice and of the bill of Exceptions tendered therewith is hereby acknowledged this 29th day of June, 1910.

McKENNEY & FLANNERY,
Attorneys for Defendant.

Be it remembered that on the 4th day of April, 1910, before the Honorable Harry M. Clabaugh, Chief-Justice of the Supreme Court of the District of Columbia and a jury regularly empaneled, the above entitled cause came on to be heard on issues regularly joined between plaintiff and defendant herein.

12 Whereupon counsel for plaintiff stated that they would go to trial upon the first count of the declaration and abandon the second and third counts.

Whereupon the plaintiff, Wisdom D. Brown, in order to maintain the issues on his part joined, testified in his own behalf substantially as follows:

That he is the plaintiff in this case; that he has dealt in rural mail boxes; that on or about the 16th day of January, 1907, he received a notice from the Phila., Balto. & Washington R. R. Co., that a consignment of mail boxes had been received here for him; that the shipment consisted of 303 crates containing 1794 boxes; that these boxes are made according to Government specifications and must be absolutely uniform or otherwise the Government would condemn them. The Government specifies the weight of the metal, the gauge of the metal and the dimension of the boxes; that the only possible variation of the weight must be the weight of the crates themselves; that he received a bill of lading for these goods; that he received a shipping ticket from the factory which specified the number of crates of the different sizes, the number of boxes contained in them, the separate weights of each; that after the receipt of the notice from the Railroad Company and after figuring what

he assumed to be the correct amount of the freight charges called for by the shipment, he went to the depot and made a tender of the money and demanded the goods from the cashier or someone behind the cashier's stand; that this demand was made on the 17th day of January, 1907; that the Railroad Company refused to give
13 him the goods without paying a freight bill of $93.11, which was about 2500 pounds in excess weight of the shipment. He protested against those weights. The cashier referred him to the chief-clerk—he showed the chief-clerk his loading ticket from the factory and told him the circumstances; that the boxes were absolutely uniform in size, material and everything else, and that there could be no possible variation in the weight, and that his weights, as claimed, were correct. The chief clerk said "Here is the freight bill and this is what we must have if you want the goods." That he was then referred to Mr. Bowie as the person in charge down there and he protested to Mr. Bowie, who refused to deliver the goods to him; witness said to Mr. Bowie, "Well, Mr. Bowie, under the circumstances, there is just one thing to do. You claim the weight is a certain amount—I claim it is a certain amount, a certain other weight. I demand that the car load of mail boxes be weighed over your platform scales, and that I be allowed to be present when they are weighd. I am interested in these weights—I know what the weights should be." That with great reluctance and some show of feeling in the matter, Mr. Bowie agreed to have the goods weighed over the platform scales. That upon witness' question as to when he could get them, Mr. Bowie told him to come down there tomorrow afternoon; that instead of waiting until the next afternoon, he went down early next morning and asked the warehouse superintendent if the car had been re-weighed and he said that it had; that the warehouse superintendent said "come up stairs with me and I will fix it so that you can get your
14 goods"; that he showed witness the weight; that is amounted to 22,740 lbs.; that warehouse superintendent said to witness "that is what the carload weighs"; that the weights still seemed to witness to be high, but he did not protest any further because he was told that the shipment had been weighed on their platform scales; that he said to chief clerk "can I get the goods now" and the chief clerk replied "No, you cannot get them now, we will take it up by telegraph with the Star Union Line in Pittsburg, and we will let you know sometime during the day." That they refused to deliver the goods unless he would pay the original charges; that he was prepared to pay the freight and thinks he signified his willingness to pay it; that on the afternoon of the 18th, he gave his warehouseman $86.41 called for by the freight as ascertained by the railroad platform warehouse scales and asked him to call by the depot that night or the next morning and see if the shipment was ready for delivery; that the warehouseman went down and made a tender of the money and they again refused him; that the warehouseman was a Mr. Caton, manager of the Union Storage Furniture Company, with whom he kept his goods stored; that he again made personal inquiry of the Railroad Company about the mail

boxes on the 28th; that he asked the chief clerk of he was ready to make delivery of the shipments in controversy; that the chief clerk said he was not; that witness went to his office and notified the chief clerk by registered letter that he would decline to receive the goods that they had delayed them unduly; that they had inconvenienced him; that the rate on goods of this kind is $.38 or $.39.

15 Whereupon it was admitted upon the record that there was no controversy here about the rate; that there was no doubt that it was eventually discovered that the proper amount had been tendered.

Whereupon the witness further testified that the fair market value of these goods was $1.25 apiece.

And thereupon said witnes- further testified:

By Mr. MILLER:

"Q. On either of those occasions when you called for these goods, do you remember whether you presented this bill of lading? A. I can't say definitely whether I presented that bill of lading or not. It was my custom to do it.

Mr. FLANNERY: I object to that and ask to have that stricken out.
The COURT: Yes, that is not evidence, what his custom was."

Whereupon upon cross examination, the witness testified in substance, as follows:

That at the time the shipment arrived here, witness was engaged as sales agent for the Burnham Manufacturing Co., that the business of that company is to manufacture mail boxes; that these boxes were consigned to witness from Wapakoneta, Ohio; that he was formerly connected with the claims or law department of the Southern, Wabash and the Missouri & Pacific R. R. Cos., and that he was engaged in the investigation and adjustment of freight claims; that the shipment arrived here on the 16th day of January; that witness first appeared in Mr. Bowie's office on January 17th; that he was told that the billed weight of the goods was 24,500 lbs., and

16 that the freight charges assessed on this weight were $93.11; that witness' contention was that goods weighed somewhere between 21,000 and 22,000 lbs., that his estimate of weights was based on weight forwarded to him by the factory.

And thereupon said witness further testified on cross examination as follows:

"Q. At the time you made that demand upon Mr. Bowie, did you have this bill of lading? A. I had the bill of lading, and I had these shipping directions from the factory, and I presented them to Mr. Bowie, explained to him——

Q. I notice that this bill of lading says "303 mail boxes, weight subject to correction, 18,000 pounds." A. Yes.

Q. If you had this bill of lading at that time,—What caused you to arrive at a different conclusion as to the weight of these boxes than the weight stated in this bill of lading. A. The classification of mail boxes specifies a minimum weight for certain length cars, and the length of cars on which this shipment was loaded, I as-

sume, called for 18,000 pounds minimum; but the bill of lading states that the weight inserted in the bill of lading is subject to correction. The weight indicated by the shipping slips from the factory showed the actual weight to be 22,126 pounds. Therefore I knew that the weight, 18000 pounds in the bill of lading, was not correct, and I did not make any claim based on that weight.

Q. So you had this bill of lading in your possession and
17 you knew that the weight named in the bill of lading was not correct, although it was named there at the factory, and you did not present that bill of lading to Mr. Bowie? A. Not as demanding the freight charges on the bill of lading weight.

Q. What sort of boxes were these? What was the nature of the box? A. It was a patented rural mail box, what we call our semi-automatic box, a box of special design made only by the Burnham Manufacturing Company and at that time sold only by me as the general sales agent.

Q. Were they made of steel or iron, or what metal? A. They were made of galvanized iron.

Q. They are the boxes that we see throughout the country, placed upon the farmers gate posts; aren't they? A. You see a good many.

Q. The boxes you put letters in? A. You see a good many of our boxes.

Q. That is the character of box; isn't it? A. Well, it is a rural mail box, yes.

Q. I take from one of your letter heads this description of the box: The Burnham boxes are made of very heavy galvanized iron, thoroughly painted inside and out with the best aluminum paint, and are practically everlasting." That is true, is it? That is a fair description of the box? A. Well, it depends on the treatment they get.

Q. Of course, you can take a box and hammer it to pieces, but I mean in the ordinary wear and tear which they are sub-
18 jected to. A. Everlasting is a relative term.

That when he went to the railroad office on January 17th to get these boxes, he had funds with which to pay the freight charges; that he made tender to the cashier; that the cashier refused the money and referred him to the chief clerk, that he made this tender by handing him the money; that he tendered him $84.08, based on the weight of 22,125 lbs. at $.38 per hundred lbs. That at that time the chief clerk demanded payment upon weight on weights given him by the way-bill, amounting to $93.11; that he knew that the P. B. & W. R. R. Co. had not made the original contract of shipment; that he knew the goods came here from Wapakoneta over the lines of the other railroad companies, including the Toledo and Ohio Central Railroad Company, the original carrier.

Mr. FLANNERY: "As a man of experience from being freight claim agent on other railroads, you know that the terminal carrier had to communicate with the proper officers of the original carrier, where there was any conflict in the rate or weight or anything of that kind?

A. No sir.
Q. You do not. A. It is not the custom."

That the shipment was finally tendered to him by Mr. Bowie on January 30th for the freight charges based upon the scale weights of 22,200; that it was the day after Mr. Bowie had gotten witness' letter notifying him that he would refuse the shipment. That after he refused to take the boxes, he was notified that they would be put on storage; that he was notified by the storage company that
19 the boxes would be sold for storage charges; that he attended the sale of the boxes in April or May, 1909; that he did not buy them; that they were bought by a person from whom he afterwards purchased them; that they were bought by Mr. Welcher of the Globe Printing Company; that witness is editor of a paper published by the Globe Printing Company, the Rural Free Delivery News.

Whereupon plaintiff further to maintain the issues upon his part joined, produced MAX CAYTON, who being first duly sworn testified in substance as follows:

That he is manager of the Union Storage Company; that about the 17th of January Mr. Brown sent him a notice from the Railroad Company to get an order of mail boxes; that he sent his man down there with the money to get the mail boxes and the man phoned up that the Railroad Company claimed something like $6 or $7 more than the money he was provided with to pay the freight; that witness phoned to Mr. Brown and told him about it and Brown said he should go down and see about it himself. That on the morning of the 19th he phoned the Railroad Company, at Mr. Brown's request, and they said they were ready to deliver the goods; that he went down to get the goods and the Railroad Company claimed more than he had, to pay the freight; that he had about $84 and the Railroad Company demanded $93; that witness demanded the goods from the cashier, who told him that the charges were not right, said that witness did not have enough money with him; that he was detained at least an hour and a half there, going around to the chief clerk and the manager endeavoring to get the goods. That they refused to deliver the goods.

Thereupon the defendant to maintain the issue on its part
20 joined, produced as a witness one JOHN L. SINCLAIR, who being duly sworn testified in substance as follows:

That he is manager of the Washington Storage Company; that previous to the first of July, 1909, he was superintendent of the storage department; that the mail boxes in question were stored on September 28, 1907, to the account of W. D. Brown; that the storage company paid the charges to the Pa. Railroad Company of $84.36 at that time; that they were sold to J. T. Welcker, May 21, 1909, for the charges of his company amounting to $575.82, of which $84.36 was freight advances; that the balance after payment of these charges is still held by the storage company; that the

usual advertisement was published and legal notice of the sale was given to W. D. Brown previous to the sale.

Whereupon counsel for the plaintiff moved to strike out all the testimony of the witness as being wholly immaterial to any of the issues in the case, which motion was overruled by the court, to which ruling the plaintiff then and there prayed an exception, which was allowed him and the same was then and there duly noted upon the minutes of the court.

Whereupon the defendant further to maintain the issue on its part joined, produced as a witness one WALTER W. BOWIE, who being duly sworn, testified in substance as follows:

That he is the freight agent for the Phila. Balto. & Wash. R. R., which runs from Philadelphia to Washington; that the shipment of mail boxes in question was brought to his attention by Mr. Brown,

21 on the morning of January 17th, who stated that the freight bill for the same was excessive, and witness then sent for the way-bill; that the shipment was billed to Washington over the Union Lines from Columbus Ohio, at a weight of 24,500 lbs. That the gross, net and tare were given on the way-bill, showing that the car had been weighed on the track scales; that Brown said he had information that the actual weight of the shipment was 21,312 lbs. and that was the amount he was willing to pay freight for; that Brown demanded that the car be weighed; that witness had it unloaded and weighed on the various platform scales in the warehouse on January 18th; that the scale weight in the warehouse was 22,740 lbs., that the scales had only been installed a few months and were new; that plaintiff was advised on the same day of this weight and again objected and witness had the goods reweighed on the following day on one scale; that the second wieghing showed 22,200 lbs., that witness then explained to the plaintiff that it would be necessary to wire west and get authority to correct the weight, as the way-bill of the connecting line, the Toledo & Ohio Central Railroad, indicated the weight they had received them on at Columbus, and they had advanced the amount of the original weight; that witness told the plaintiff, therefore, before he could correct this he would have to get authority; that he took the matter up by telegraph, and a few days later he was notified that the connecting line disputed the accuracy of his weight, said they had weighed the shipment and 24,500 pounds was the actual weight; that plaintiff called once or twice more; that on January 28th witness received a letter from the

22 plaintiff stating that he would reject the shipment; that he again wired his auditor, Mr. Denniston, at Pittsburg, and also wrote him a strong letter urging that witness get authority to make delivery.

Whereupon counsel for the plaintiff objected to the admission of any evidence as to what the witness wrote Denniston or what Denniston wrote the witness, but the court overruled said objection, to which ruling of the court the plaintiff prayed an exception, which

was allowed him, and the same was then and there duly noted upon the minutes of the Court.

Whereupon the witness further testified in substance as follows: That on January 30th he received a wire from said Denniston stating that he could deliver on the scale weight of 22,200 lbs. and witness then wrote plaintiff the letter just read and sent it by messenger; that he saw the plaintiff again about February 1st and had a very pleasant conversation with him, that he urged him to make the shipment and told him there was nothing to be gained by holding out; that the difference in freight, on the weight plaintiff claimed, was only something like $3.27 and the original difference was somewhere about $8 between the weight he claimed and the weight on the way-bill; that plaintiff told the witness he was going to take a trip south and was going to see his firm and when he came back he would let him know definitely but that his letter stood for the time being, and possibly, if he could see his way to take them and close them out, he would communicate with witness further; that witness wrote quite a number of letters to plaintiff on the
23 subject, but never succeeded in getting him to take them; that the goods were held in the warehouse for sometime pending witness' efforts to have the plaintiff accept them, but since he did not, they were placed on storage the following December in the Washington Storage Company; that the storage company advanced the freight charges and held the goods until May, 1909, when they were sold at public auction; that his company did not request the sale to be made or receive any of the proceeds; that in addition to being agent of the Philadelphia, Baltimore & Washington Railroad Company, witness represented the Union Line in Washington.

Whereupon counsel for plaintiff objected to the admission of any testimony with reference to the Union Line, but the court overruled said objection, to which ruling the plaintiff prayed an exception which was allowed and the same then and there duly noted upon the minutes of the court.

Whereupon witness further testified in substance as follows:

That this was Union Line business; that he was agent for the Union Line in Washington: that the Union Line is a through freight line operated principally by the Pa. R. R. over various lines with which they pro rate the earnings; that the shipment in question passed over the Pittsburg, Ft. Wayne & Chicago, the Pa. R. R., the Northern Central and the Phila. Balto. & Washington: that in the first place it came over the Toledo and Ohio to Columbus, and was there turned over to the Union Line and billed at the weights furnished by the Toledo & Ohio Central; that the Phila. Balto. & Wash. R. R. Co. took the shipment at Baltimore, carried it
24 about 41 miles, and its proportion of the through freight charges was less than $5.

Whereupon counsel for the defendant exhibited a paper which the witness identified as the way-bill for the shipment in question, which reads as follows:

"Union Line.
Pennsylvania Railroad Co. Pennsylvania Company.

Date, 1/7/07. Consignee, W. D. Brown—303 crates of mail boxes shipped from Wapakoneta, Ohio, weight 24,500—gross 56,-400—weight of car 31,500 lbs—net weight 24,500 lbs. charges from Columbus to Washington, $70.81 and amount paid out to Toledo & Ohio Central $22.30 making total freight charges of $93.11, collectable at Washington on the through rate of $.38 per hundred."

That said way-bill came direct from the freight agent, Sparks, at Columbus; that certain changes in the typewritten figures on it made in red ink, were made in witness' office when he received authority from John T. Denniston, the auditor of the Union Lines, whose office was at Pittsburg, to accept the Washington weights of 22,200 lbs. on January 30th; that witness had no authority to communicate directly with the Toledo & Ohio Central Railroad Company; that he communicated through Denniston, the auditor in Pittsburg.

Whereupon counsel for the defendant offered said way-bill in evidence, to the admission of which the counsel for the plaintiff then and there objected upon the ground that it was not binding upon the plaintiff and was an agreement between the delivering carrier and the other carriers which could not in any manner affect the plaintiff. But the court overruled said objection and allowed said way-bill to be given in evidence to which ruling and action of the court the plaintiff prayed an exception which was allowed him, and the same then and there duly noted upon the minutes of the court.

25 Whereupon witness further testified that the bill of lading for that shipment was never presented to him; that it was the custom to accept shipments from foreign roads at the shipper's estimated weight; that the weight shown in the column "Subject to correction" shows that the car is to be weighed and corrected at the actual scale weight; that the difference between the amount called for by the way-bill and the amount for which the boxes were subsequently tendered to the plaintiff was $8.75; that he requested plaintiff to accept the shipment and pay the amount first called for and put in a claim for refund; that he had no information as to the correct weight of the shipment and freight charges other than that contained in the way-bill.

And thereupon said witness further testified:

By Mr. FLANNERY:

"Q. In the absence of any contract of shipment or bill of lading, by what are you governed in rendering your bill for freight charges for shipments which come to your office? A. We are governed by the way-bill which covers the shipment—the revenue way-bill like this one."

Whereupon upon cross-examination the witness further testified in substance as follows:

That he is accustomed to delivering goods to consignees without the production of the bill of lading; that he had no instructions other than the way-bill and was bound by it: that he had no duplicate bill of lading, that no such duplicate comes to them at the delivery point; that he twice weighed the goods and the first weights were 22,740 and the second 22,200 pounds; that the weight
26 on the way-bill was 24,500; that the first weighing had been done on several new scales and the second weighing on one scale only, so that it would be uniform; that there is no doubt that the plaintiff offered to pay for the goods on the weight of 22,200 pounds; that he did not telegraph the initial carrier because it was against the regulations of the Philadelphia, Baltimore & Washington railroad and the Union Line; that he telegraphed on the day he weighed them to John T. Denniston, the Auditor of the Union Line at Pittsburg, as follows:

"JANUARY 18, 1907.

"Columbus to Wash. W./B. 486 January 7, 1907, car 21118 W. D. Brown. Weight 24,500 lbs. We had this consignment weighed on our warehouse scales and actual weight is 22,740 lbs. Consignees refuse- to accept on any other weight basis and threatens to replevin car unless we deliver today. Loam."

Tha- loam means answer quick; that he wired him again on the 29th and got a reply on the 30th authorizing delivery; that he had a letter from Denniston before that; that he could not say whether his first message to Denniston was sent by wire or mail.

Whereupon counsel for the plaintiff exhibited a paper, which the witness identified as being the letter received from said Denniston in reference to the shipment in question which said letter was offered in evidence by the plaintiff and reads as follows:

"Subject, Overcharge in Weight Claimed on Cars W. & L. E. 21118, and P. R. R. 96322.

Union Line.

Pennsylvania Railroad Co. Pennsylvania Company.

27 JANY. 29*th*, 1907.

Mr. W. W. Bowie, Agent, P. B. & W. R. R., Washington, D. C.

DEAR SIR: Referring to your enclosed mail message as follows:

'Jany. 18th, 07.

Columbus, to Washington W./B. 486 Jany. 7th, (1907) car 21118, W. D. Brown, Wt. 24,500 lbs. We have had this consignment weighed on our warehouse scales and actual weight is 22,740 lbs. Consignees refuse- to accept on any other (weight) basis and threatens to replevin car unless we deliver today.'

Second, Jany. 28th, 1907.

'Columbus, O. W./B. 1678, Jany. 19th (1907) P. R. R. 96322, mail boxes for W. D. Brown billed at weight 23,500 lbs. Brown

claims actual weight 21,312 lbs. and will not touch car on any other basis but will lay matter before interstate commerce commission if we do not make delivery immediately on basis of actual weight. In this connection see Columbus, O. W./B. 486, Jany. 7th, '07, car 21118 billed at weight of 24,500 lbs. actual weight found to be 22,200 lbs. Consignee will not touch except on actual weight.'

On receipt of your mail message of Jany. 18th, we took the matter up with the Agent at Columbus, O., in regard to the weight of W. & L. E. car 21118, and his reply of Jany. 28th, stating that the T. & O. C. Ry. people say that the net weight of 24,500 lbs. as billed, is their scale weight and refuse to make any correction. We have not taken the matter up with them in regard to the weight of P. R. R. 96322, referred to in your message of Jany. 28th.

If, however, your representative has over-seen the weighing of these cars at Washington, D. C., and you are satisfied that weights as claimed there are correct you can settle on this basis of weights and issue corrections, attaching certificates of weights for each car, and attaching these papers to correction.

Yours truly,

JNO. T. DENNISTON, *Auditor.*"

Whereupon witness further testified that this letter was the authority enabling him to tender the shipment to the plaintiff on January 30th; that he did not receive any authority from the initial carrier but only from Denniston the Auditor of the Union Line; that he could not have delivered the shipment and made charges
28 for the excess of the claim against the initial carrier because he had nothing to do with the initial carrier; that that was for the agent at Columbus, who had advanced the connecting line charges; that witness had no further communication with any one in regard to shipment until January 28th, when he sent a mailgram to Denniston in the words and figures following:

"In this connection see Columbus, O., W./B. 486 1/7.

Car 21118, billed at Wt. of 24,500 lbs. actual weight found to be 22,200 lbs. Consignee will not touch except on actual weight. Loam."

that in the ordinary course of business it took less than 24 hours to get a letter there; that upon receipt of such a letter the Auditor would have to take it up with the agent at Columbus, and a letter from Pittsburg to Columbus would be received the next day; that it is true that in reply to witness' last mailgram or letter sent to Denniston that said Denniston in his letter of January 29th authorized witness to deliver the boxes notwithstanding the fact that the initial carrier had refused to accept the weights found by witness as correct; that he could not have delivered the boxes on the same day they were demanded without instructions from the Auditor under the regulations of the Railroad Company; that no part of these regulations is printed on the way-bill or bill of lading; that witness did not say that he could not accept the money from Brown because he would not be able to collect it from the initial carrier, but

that the way-bill showed that the Union Line had advanced to the connecting line their proportion of the revenue based on the weight of 24, 500 lbs. and that until witness could ascertain whether they would accept a correction lowering that which would mean
29 their returning a portion of the charges, he would have to wait for instructions; that the last clause of the letter from the Auditor authorizes witness to deliver on his weights and to show correction "Attaching certificates of weight for each car, and attaching these papers to corrections"; that the correction is a notice issued to the Auditor showing how they have changed the original way-bill; that the Auditor then takes it up with the initial carrier and they adjust it among themselves; that as a matter of fact when witness finally offered to deliver the goods to plaintiff he still had no authority from the initial carrier, but that he could not have done the same thing on the day the goods were received without authority from his superior officer, the Auditor.

Whereupon upon re-direct examination witness further testified in substance as follows:

That the Philadelphia, Baltimore & Washington Railroad Company is not a part of the Union Line, but is an affiliated line of the Pennsylvania Railroad, over which the Union Line operates when there is a through bill; that witness served in a double capacity as freight agent of the P. B. & W. R. R. Co. and also agent of the Union Line, and as agent of the Union Line he took up the matter of the correction with his superior officer, the Auditor of said line; that shipments were delivered without requiring the surrender of the bill of lading unless the Company had reason to doubt the identity of the person demanding the goods as to being the person specified in the way-bill; that this was not an order shipment; that an order shipment requires the surrender of
30 the bill of lading; that such a shipment is one shipped from the initial point by a shipper to himself simply to notify someone else, and the bill of lading is in his possession and goes through a bank before you can get the goods; that they then demand the surrender of the bill of lading with the shipper's endorsement; that form of shipment is called an order consignment, but a straight consignment is like the one in question and does not require the surrender of the bill of lading.

Whereupon the defendant further to maintain the issue on *his* part joined, produced as a witness one JOHN D. MAHON, who being duly sworn testified in substance as follows:

That on January 17, 1907, he was Chief Clerk of the P. B. & W. Freight Station at Washington; that plaintiff called at his office on January 17th and claimed that the carload of mail boxes in question was billed at erroneous weight; that he explained to plaintiff that he was unable to correct the billing without authority from his Auditor; that if plaintiff would pay the bill he would telegraph the Auditor and obtain authority to make a refund within a reasonable time afterwards; but plaintiff refused to do that; that plaintiff called the next day and witness referred him to Mr. Bowie; that

witness told the plaintiff that if he would pay the bill as rendered they would get authority to make the correction in about a week or ten days; that plaintiff refused to do so; that witness did not see the bill of lading at either of these interviews; that all the information he had in fixing the freight charges was the way-bill which came to them in the mail from Columbus, Ohio.

Upon cross-examination, witness further testified in sub-
31 stance as follows:

That when he stated he had no other information concerning the weight of shipment except that obtained from the way-bill he meant until the car had been weighed; that when the car was weighed he found the weight to be considerably less, namely, 22,200 pounds; that no question was ever raised as to the rate of charges; that he suggested to plaintiff that he pay the bill as it was rendered, in order to save delay in getting the crates and they would be very glad to do everything they could to get things straightened out as speedily as possible, which would be a week or ten days at the most; that he explained to him they had no authority to make an alteration on the billing to them without the authority of their Auditor—the Auditor of the Union Line, for whom Mr. Bowie was agent here; that he did not deliver to plaintiff and others consignment of boxes after ascertaining their true weight as against the weight shown in the billing without authority.

Whereupon counsel for defendant read in evidence the deposition *de bene esse* of William H. Sparks, taken on behalf of the defendant, in which said witness testified substantially as follows:

That in January, 1907, he was local freight agent of the Pennsylvania Line at Columbus, Ohio; that Wapakoneta, Ohio, is on the Toledo and Ohio Central Railway; that the line of the Pennsylvania Railroad did not run from Columbus to Wapakoneta.

Witness identified the way-bill of the Union Line for the shipment in question.

Whereupon counsel for plaintiff objected to any testimony
32 as to the way-bill in question as immaterial but said objection was overruled, to which ruling of the court, plaintiff prayed an exception, which was allowed him and the same was then and there duly noted upon the minutes of the court.

Witness further testified that said way-bill was prepared in his office from information given on a transfer slip or freight bill delivered to him with the car by the Toledo & Ohio Central Ry.; witness produced said transfer slip, and said way-bill and said slip were duly marked for identification; that at the time said way-bill was made out the shipment was not weighed at Columbus; that witness relied entirely on the weight as shown by said slip.

Whereupon counsel for plaintiff objected to said last mentioned testimony as immaterial and irrelevant and moved to strike it out, but the court overruled said objection and motion to which ruling of the court plaintiff then and there prayed an exception which was allowed him and the same duly noted upon the minutes of the court.

Witness further testified that the shipment in question came over

the Pittsburg, Cincinnati, Chicago & St. Louis Ry. to Pittsburg; over the Penn. R. R. from Pittsburg to Harrisburg; over the Northern Central Ry. from Harrisburg to Baltimore and over the P. B. & W. Ry. from Baltimore to Washington; that witness was not the agent of or employed by the Philadelphia, Baltimore & Washington R. R. Co., nor the agent of the Toledo & Ohio Central Ry. Co., that he next heard of this shipment upon receipt of the mailgram—
33 that is a telegram sent by mail—from J. T. Denniston's office, the Auditor of the Union Line at Pittsburg on January 21, 1907; witness at once told the local freight agent of the Toledo & Ohio Central R. R. at Columbus that he had been advised that the weight of the shipment was 22,740 lbs. and asked him to correct their billing, which said agent refused to do; that witness then notified Denniston of that fact; that he made no other effort at that time to obtain a reduction of weight from the Toledo & Ohio Central R. R.; that his notification to Denniston above mentioned was on January 28, 1907; that the freight agent of the Toledo & Ohio Central R. R. claimed his scale weight of 24,500 to be correct and refused to accept correction; that the change in figures on the slip from the Toledo & Ohio Central R. R. from 24,500 lbs. to 22,200 lbs. was made in witness' office, after he had notified Denniston of the refusal of the Toledo & Ohio Central to accept correction.

Whereupon upon cross-examination witness further testified in substance as follows:

That on February 11, he issued a correction to the Toledo & Ohio Central Ry. reducing the weight to 22,200 lbs. and the Toledo & Ohio Central Ry. agreed to the correction at that time.

The defendant further to maintain the issue on its part joined, offered in evidence a letter from W. W. Bowie to the plaintiff in reference to the shipment in question, which letter was duly identified by the *plaintiff*. To which offer counsel for the plaintiff
34 objected but the court overruled said objection and allowed said letter to be introduced in evidence, to which ruling and action on the part of the court the plaintiff prayed an exception, which was allowed him, and the same was then and there entered on the minutes of the court. Said letter was in words and figures following:

WASHINGTON, D. C., *January* 30*th*, '07.

File 1792.

Mr. W. D. Brown, No. 813 15th Street, City.

DEAR SIR: I have your letter relative to weight of carload of mail boxes. I could not accept your proposition to deliver until I heard from the Western Lines and they refused to accept my correction on the weight, claiming their scales were correct. I have finally this evening succeeded in getting authority from our Western Management to deliver to you on our scale weight and I am now prepared to deliver to you on that basis. Please call for your freight

to-morrow so it will not be necessary for me to place it on public storage.

Respectfully,

W. W. BOWIE, *Agent.*

W. W. B./K.

Whereupon counsel for the plaintiff renewed his motion that all the testimony produced by the defendant which tended to establish any other defense than that there was doubt as to the identity of the consignee, or that the contract of carriage was different from that which appeared by the weight ascertained by the defendant, or the rate be stricken from the record on the ground that the defendant should not be permitted to set up any defense except that plaintiff had no right to receive his goods or that defendant had no method of finding out what the contract of carriage was. But

35 the Court overruled said motion to which ruling of the Court plaintiff prayed an exception, which was allowed him, and the same was then and there noted upon the minutes of the Court.

The foregoing is the substance of all the evidence given or offered at the trial. At the conclusion of the evidence the plaintiff requested the Court to instruct the jury as follows, which requests the court granted:

IV. The jury are instructed to return a verdict for the plaintiff for the value of the goods, as the same appears from the evidence, with interest, (unless they shall find as a fact that the agent of the railroad company had reasonable cause to refuse delivery of said goods on January 18, 1907) unless the jury shall find that the officers and agents of said company exercised due diligence and acted with reasonable promptness and in good faith to ascertain whether or not a mistake had been made in respect of the weight and freight charges on said goods, and in causing such mistake to be corrected.

Granted as modified.

V. The jury are instructed that in the consideration of the question as to whether or not the defendant company acted with due

36 diligence in obtaining the confirmation of the correction of weight upon the shipment of goods in question they are not to consider any rule or regulation of the defendant company, or of its affiliated organization, the Star Union Line, as affecting the question of whether or not due diligence was used by the defendant, but that apart from any such rule or regulation, the defendant was bound to exercise due diligence and act with reasonable promptness in correcting the mistake made as to the weight of the goods, and in offering to deliver the same to the plaintiff on the payment of the correct freight charges.

Granted.

And thereupon the plaintiff requested the court to instruct the jury as follows:

I. The jury are instructed to return a verdict for the plaintiff for a sum equal to the value of the goods involved, with interest at

the rate of six per cent per annum from the 18th day of January, 1907.

Rejected.

II. If the jury shall find, from the evidence, that the freight charges claimed by the defendant on January 18, 1907, for carriage of the goods mentioned in the declaration were excessive, in that they were based upon a statement of the weight of said goods, which was in excess of the actual weight of said goods, and if they further find that an amount equal to or in excess of the correct freight charges based on the actual weight of said goods was tendered by the plaintiff or his agent, and the delivery of said goods
37 demanded by him, or by his duly authorized agent, and refused by the defendant, then the jury are instructed as a matter of law, that these facts constituted an unlawful conversion by the defendant of the goods of the plaintiff, which entitles the plaintiff to a verdict for the value of said goods, with interest from the date of said conversion.

Rejected.

III. If the jury shall find from the evidence that the freight charges claimed by the defendant on the goods mentioned in the declaration were in excess of those lawfully entitled to be claimed by the said defendant, and if they further find that a tender of the full amount of the charges lawfully due said defendant was made by the plaintiff, or his agent, and delivery of said goods demanded by said plaintiff or his agent thereto duly authorized, then the plaintiff or his agent, as aforesaid, was entitled to the delivery of said goods and the jury are instructed that upon its refusal to deliver the same, the defendant, as a matter of law, converted said goods to its own use, and their verdict should be for the plaintiff for a sum equal to the value of said goods on the day and date of said conversion, with interest thereon.

Rejected.

But the Court refused to give any of said instructions prayed by the plaintiff, to the refusal of each of which instructions the
38 plaintiff then and there prayed an exception, which exception in each case was allowed him, and the same and all of the said exceptions were duly noted on the minutes of the court.

And thereupon the defendant requested the court to instruct the jury as follows, which requests for instructions the court granted:

I. If the jury shall find from the evidence that the freight agent of the defendant, the Philadelphia, Baltimore and Washington Railroad Company, had reasonable cause to hold the shipment of mail boxes consigned to the plaintiff because of the difference in weights in order to obtain instructions from the intermediate and initial carriers for the delivery of the boxes at the correct weight and that said agent exercised reasonable diligence in endeavoring to obtain said instructions and in offering or tendering said boxes to the plaintiff upon receiving said instructions, their verdict must be for the defendant.

Granted.

II. The jury are instructed that the defendant, the Philadelphia, Baltimore and Washington Railroad Company, is only liable in this action for the acts and omissions of its own agents and servants and cannot be held responsible for any mistakes which may have been made or any delays in ascertaining the correct weight of and charges upon the shipment in question which may have occurred by
39 reason of the acts and omissions of agents of the initial carrier, the Toledo and Ohio Central Railway Company, or the freight agent at Columbus, Ohio, or the Auditor at Pittsburg, Pennsylvania, of the Union Line, the intermediate carrier, which received the shipment from said initial carrier and delivered it to the Defendant at Baltimore, Maryland.

Granted.

And thereupon the Court voluntarily and on its own motion charged the jury as follows:

Gentlemen, this case is a little different from the cases that you have been trying. The plaintiff is suing the defendant in this case because he says that the defendant has converted unto his own use the mail boxes that were sent to the plaintiff. That is the charge—that they have converted them to their own use, or, in other words, that they have taken without authority of law, the mail boxes that belong to the plaintiff and have converted them to the use of the defendant, the railroad company.

If they have done that, then of course the plaintiff is entitled to recover, and the measure of that recovery would be the value of the property, with interest from the time of the conversion by the railroad company of the boxes in question. That is always the rule of law where there is what is known as a conversion of the goods of somebody else. That is the theory upon which this action rests. I shall not undertake to explain to you how the action was originally founded, because there is no particular reason to explain it.

The defendant comes in and says that it did not take these boxes; that it never did convert them to its own use and that all it
40 did was to state to the plaintiff that the way bill showed that these boxes weighed more than the plaintiff in this case was willing to pay freight on, and that it was incumbent upon the defendant to collect the charges that their way bill called for. You will understand that the boxes had passed, in the meantime, over several other lines, before they came to the terminal company, the defendant in this case.

The law, as I understand it, is that if there be found a difference, in good faith, between the railroad company and the person to whom the goods are consigned, as to the amount of freight that is due on them, then the railroad company, if there is a fair and reasonable difference between the parties, is entitled to ascertain and to have corrected the amount of the freight. In other words, if there be a contention between the parties the railroad company ought to have reasonable time to ascertain the cause of it and have it corrected, provided they are acting in good faith. The question as to

whether they have occupied a reasonable or an unreasonable time is a question for the jury.

If you think that the defendant in this case used—not the greatest diligence, or the greatest promptness that you can imagine—reasonable diligence and reasonable promptness in having the difference between the parties corrected, and acted in good faith in the matter, and subsequently offered to give the boxes to the plaintiff at the amount of freight which he said was due and which he was willing to pay—if you find as a fact, that they used reasonable diligence in ascertaining these facts, then this plaintiff
41 would not be entitled to recover.

If they did not use reasonable diligence and promptness in ascertaining the fact, then the plaintiff would be entitled to recover.

In examining the question whether the defendant exercised due diligence in its efforts to ascertain the true amount of freight, you are not to consider the question as to what the rules and regulations of the connecting companies are or what would be reasonable conduct on the part of those companies. The basis on which you must decide this case is as to whether or not the defendant company, taking all of the evidence of this case into consideration, used reasonable diligence in the correction of this error. If they did, then the plaintiff cannot recover. If the defendant company did not use reasonable diligence, then the plaintiff is entitled to recover.

So that it is a mere question of good common sense, applied to a rule of law which is perfectly manifest and perfectly plain.

You are to judge whether or not, in this case, the action of the defendant in the case was reasonably diligent in using all the means at hand to ascertain the correct weight of the boxes. There is no question that, subsequently, they offered the boxes to the plaintiff at the rate which was originally offered by the plaintiff in this case.

So that if you should find that the defendant acted with reasonable diligence then your verdict should be for the defendant. If it did not act with reasonable diligence then the plaintiff is entitled to recover.

42 The amount of damages that the plaintiff would be entitled to recover would be the amount of the value of the goods at the time of their conversion by the railroad company, with interest from that date. I think that is all it is necessary to say to the jury.

Mr. BAKER: We desire to renew our exceptions to the refusal to grant the first, second and third prayers of the plaintiff, severally.

Mr. FLANNERY: I reserve a special exception to that portion of the charge relating to the measure of damages, and also renew my exceptions to the overruling of our motion and to the instructions.

A verdict for the defendant was rendered on April 5, 1910.

All of the exceptions herein stated having been duly taken, allowed, settled, and noted during the trial and before the jury rendered its verdict as aforesaid, the plaintiff presents to the court this his bill of exceptions and prays the court to sign and seal the same

and make the same part of the record, to have the same effect as if each of the said exceptions *were* contained in a separate bill and had been signed and sealed during the trial; and the same is accordingly done, now for then, this the 13th day of July, 1910.

HARRY M. CLABAUGH,
Chief Justice of the Supreme Court of the District of Columbia.

Settled by consent: July 8, 1910.

G. L. BAKER,
C. C. MILLER,
H. H. OBEAR,
Attorneys for Plaintiff.
McKENNEY & FLANNERY,
Attorneys for Defendant.

43 *Directions to Clerk for Preparation of Transcript of Record.*

Filed Jul- 11, 1910.

* * * * * * *

The plaintiff designates the following portions of the record to be included in the transcript of record on appeal:

1. Declaration, July 22, 1908.
2. Pleas, August 5, 1908.
3. Joinder of issue, September 9, 1908.
4. Memorandum of Verdict, April 5, 1910.
5. Judgment, April 13, 1910.
6. Notation of Appeal, April 14, 1910.
7. Citation on Appeal, April 14, 1910.
8. Memorandum of filing of bond and approval, May 6, '10.
9. Memorandum of first order extending time for settling bill of exceptions and filing transcript, May 25, 1910.
10. Memorandum of second order extending time for settling bill of exceptions and filing transcript, June 24, 1910.
11. Memorandum of submitting bill of exceptions to court.
12. Order making bill of exceptions of record.
13. Bill of exceptions.
14. Memo. of order extending time to file transcript.
15. This designation.

G. L. BAKER,
C. C. MILLER,
H. H. OBEAR,
Attorneys for Plaintiff.

Service of the foregoing designation is hereby acknowledged this 29th day *if* June, 1910.

McKENNEY & FLANNERY,
Attorneys for Defendant.

44 *Memorandum.*

July 13, 1910.—Time in which to file transcript of record in Court of Appeals further extended to and including the first day of August, 1910.

45 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50792 at Law, wherein Wisdom D. Brown is Plaintiff and Philadelphia, Baltimore and Washington Railroad Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 21st day of July, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2195. Wisdom D. Brown, appellant, vs. Philadelphia, Baltimore and Washington Railroad Company, a corporation. Court of Appeals, District of Columbia. Filed Jul- 22, 1910. Henry W. Hodges, clerk.